No. 15918

In the

United States Court of Appeals

For the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY,
a corporation, *Appellant,*

vs.

JOHN LYLE MONTGOMERY, *Appellee.*

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable GUS J. SOLOMON, *District Judge*

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
JOHN GORDON GEARIN
JAMES H. CLARKE
Eighth Floor, Pacific Bldg., Portland 4, Oregon
Attorneys for Appellant

BENSON & DAVIS
W. F. WHITELY
ALAN F. DAVIS
Public Service Bldg., Portland 4, Oregon
Attorneys for Appellee

DAILY JOURNAL OF COMMERCE

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES—(Continued)

STATUTES AND OTHER AUTHORITIES

No. 15918

In the

United States Court of Appeals

For the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY,
a corporation, *Appellant,*

vs.

JOHN LYLE MONTGOMERY, *Appellee.*

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable GUS J. SOLOMON, *District Judge*

JURISDICTION

This action was brought in the Circuit Court of Oregon for Multnomah County by plaintiff-appellee, a citizen of Oregon, against defendant-appellant, a Colorado corporation, seeking to recover death benefits under a policy of insurance issued by appellant on the life of appellee's deceased wife (R 6). Appellant removed the case to the United States District Court

for the District of Oregon under 62 Stat 937 (28 USCA § 1441). The amount in controversy, exclusive of interest and costs, exceeds $3,000 (R 3, 8).

Appellant has appealed from the final judgment of the district court (R 21-22).

The district court acquired jurisdiction under 62 Stat 930 (28 USCA § 1332) and 62 Stat 937 (28 USCA § 4441). This Court acquired jurisdiction under 62 Stat 929 (28 USCA § 1291) and 62 Stat 930 (28 USCA § 1294).

STATEMENT OF THE CASE

Appellee seeks to recover double indemnity death benefits under a policy of life insurance (No. 27244D) issued by appellant October 27, 1954 on the life of his wife, Anna Grace Montgomery, who died January 20, 1956 (Ex 1). Appellee is the beneficiary named in the policy (R 4-14).

On March 12, 1956 appellee submitted proof of death and demanded payment of the policy benefits. Appellant rejected the demand and notified appellee before the complaint was filed that it rescinded the policy and tendered the amount of premiums previously paid with interest. The tender was rejected (R 4-14).

The insured had died within the two year incontestability period provided in the policy (R 223), and

appellant's refusal to recognize the policy was based on certain alleged fraudulent statements contained in the policy application.

The case was submitted to the jury on four sets of special interrogatories, each set relating to a specific question and answer contained in the policy application (R 15-17). With respect to each question and answer, the jury found that the answer contained in the application (a) was material; (b) was relied on by appellant; but (c) was not wilfully false (R 15-17).

Based on the jury's answers to the interrogatories, judgment was entered for appellee for the face amount of the policy, together with an attorney's fee[1] in the amount of $5,000.00 (R 15-18).

Appellant's motion for judgment n.o.v. or, in the alternative, for a new trial (raising errors in the admission and exclusion of evidence) was denied (R 18-21, 209-220), and appellant thereafter filed its notice of appeal (R 21-22).

STATEMENT OF THE EVIDENCE

The policy application admittedly was prepared by the insured and appellee (who is a doctor and the named beneficiary in the policy) and signed and sub-

[1] Under ORS 736.325

mitted to appellant by the insured on October 13, 1954 (R 81-84, 148-149, 159-160, 162, 227).

The following questions and answers were contained in Part 1 of the application (with answers in italics):

"27. Have you had or have you ever been told you have or have you ever been treated for:

. . . (e) Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells?

No"

"28. Name below all causes for which you have consulted a physician or healer in the last ten years; give details: (Include also particulars of any 'Yes' answer to Question 27.)

Disease or Injury (If none, state 'None')	Date	Duration	Complications
Nervousness	*2 yrs. ago*	*about 2 mos.*	*None*
Suspension (Uterus)	*3 yrs.*		*None*

Was Operation Performed	Result	Name and Address of Attending Physician or Healer
	Excellent	*Joseph Cooney*
	Excellent	*Dr. Ira Neher*"

"29. Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not in-

cluded in any of the above answers? (If yes, give full particulars.)?

No."

"33. Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the Company should be advised? (If none, please state 'None.')

None" (R 227)

Question 10 of Part 2 of the application (Declaration to Medical Examiner) and the answer thereto read (in part) as follows:

"... D. Have you ever undergone any surgical operation?

E. Have you consulted or been treated by any physician for any ailment or disease not included in your above answers? (If so, give full details.)

'Yes' or 'No'	Name of Ailment Disease or injury	No. of Attacks
(D) *Yes*	*Suspension (Uterus)*	
(E) *Yes*	*Nervousness*	
~~No~~		

	Date	Duration	RESULTS and, if within five years, name and address of every physician consulted
(D)	*3 yrs. ago (Feb)*		*Excellent Dr. Ira Neher*
(E)	*Before & after above surgery*		*Excellent Dr. Joe Cooney*

(R 230)

It is undisputed that the insured had been a patient in the psychiatric ward of Holladay Park Hospital under the care of Dr. Robert Coen and Dr. Herman Dickel, psychiatrists, on March 7 to 10, 1951 and again on April 9 to 22, 1951, a total of approximately 18 days (R 41-42, 82-83, 87-88, 90).

Her first visit was for a psychiatric examination (R 88). She was taken in an irrational condition (R 67, 73) to the hospital by ambulance and was placed behind locked doors in the psychiatric ward (R 60, 82, 83, 155). She was sent to the hospital on that occasion, and Dr. Coen was called for consultation by her regular doctor, Dr. Joseph Cooney, an internist,

> "because her agitation was to such an extent that he didn't feel, from a medical viewpoint, that it fell within his realm to manage it, and he would like to have consultation." (R 152; see also R 64, 67, 164-165)

During her second visit, "after considerable consultation," she was given five shock treatments (R 88, 92-93). Appellee consented to these shock treatments (R 82-83, 93), which at that time were given to patients presenting any major psychiatric illness or a depression of almost any degree (R 93).

Her diagnosis on each occasion was "schizophrenia, paranoid type" (R 50, 90, 95, Ex 3A), which is a mental illness involving the functions of the nervous system (R 61, 95-96). There was no organic disturbance of the central nervous system (R 94-95).

The condition of paranoid schizophrenia was described by Dr. Dickel as follows:

> ". . . The word actually from a medical point of view, means the condition in which an individual physically may be entirely intact, functioning, living, going about with the rest of us in the same way that the rest of us do, but mentally and emotionally is at that moment not functioning the way that he should. In other words, there is a splitting between the physical aspects of the individual and the emotional or the mental aspects of the individual.
>
> "Perhaps a little example might clarify it for you. Under certain circumstances, a person coming to court, say, on a Monday, getting up in front of a group of attorneys and the jury, would physically and mentally and emotionally show some degree of distress which I am sure I can manifest at the present time. In other words, my mental, my emotional, my physical reactions are all essentially the

same. They are all functioning pretty much in keeping with the situation.

"A schizophrenic individual might physically be here, but mentally, in order to answer the question, might laughingly talk about the Queen of the May or what happened on the Fourth of July in 1854 or might get up and dance around or some such thing like that; a rather obscure example, but I used the obscure one in order to show you that they may physically be in the same world we are, but mentally and emotionally at that time they wouldn't.

"The word 'schizophrenia,' therefore, refers not to a specific disease like pneumonia or chicken pox but rather to the way that the individual is reacting. Unfortunately, nobody at the present time knows what is the cause of schizophrenia. It has been assumed up until the last three or four years that schizophrenia was entirely a disturbance 'from the ears on up,' putting it in ordinary language. In the last three or four years certain very important discoveries have been made. One of these discoveries is that it is possible to take the blood of a schizophrenic patient and inject it into an entirely normal person and produce schizophrenic symptoms so for the first time in the history of medicine we are beginning to doubt that there is such a thing as a mental disease in the sense that it is all in one's imagination. Apparently, it begins to appear that certain physical changes or endocrine or glandular changes in the body at any give (sic) time can produce a disturbance which we could call in psychiatry a schizophrenic reaction so that at the present time in using the word 'schizophrenia' the doctor refers to a particular way a person is reacting.

"Schizophrenia may be a permanent thing, as is evidenced by the number of people who are in the State Hospital over a period of many, many years. Schizophrenic reactions may be temporary,

as little as two or three days, and the reason why some are permanent and some are temporary, again we doctors do not know. If it is proven that it is a chemical sort of problem, then we will know because chemical things can vary.

"The expression 'paranoid' refers to a schizophrenic condition or a schizophrenic reaction in a patient where the individual is blaming other people for the things that are going wrong in him. Now, we are all inclined to do that sort of thing a little bit, and in a schizophrenic patient or a patient with schizophrenia, that blame is to a degree that is serious, serious enough for the doctors to wonder about it, serious enough for the doctors to so label it. Under ordinary circumstances, all schizophrenic people blame others a little bit, but where it is used as a part of the diagnosis it is to a point where it is somewhat more serious, a little more serious than under ordinary circumstances." (R 51-53; see also R 90, 95-96)

Appellee described her symptoms as follows:

"Q. At the time, Doctor, just immediately prior to going to the hospital in March of 1951, could you explain to the Court and jury what her condition was?

A. Well, as I previously stated she would at times become agitated and she was smoking two to three packs of cigarettes a day, and at times she would cry, or I might come home and find her crying and, oh, yes, and at times she felt that her, some of her own relatives had said things in the past that upset her that were not true." (R 151-152)

"Q. Who was it that decided in April — it was just less than a month's time, wasn't it, that Mrs. Montgomery was taken back to Holladay Hospital?

A. Yes.

Q. Would you explain why?

A. Yes, because again she became depressed and agitated and would cry and would smoke cigarettes. She was never an individual to drink heavily, but if we went out socially I don't mean that she would get drunk. She would nervously drink her liquor and be excitable a combination not of drunkenness but a combination of this nervous agitation, smoking cigarettes and putting her drink down and talking in an agitated manner with people and skipping from one subject to another in her discussion. Therefore, I talked it over with her and with Dr. Cooney, and she agreed again that this time to go back to the Holladay Park, and Dr. Cooney referred her there again." (R 153-154)

Her symptoms were further described by Dr. Coen as follows:

"A. She presented three things: One, a looseness of association by which is meant that her ideals (sic) did not hang together;

Second, she presented ideals of references. This term is used to indicate people who feel that events or statements are meant for them; and

Third, she presented delusions of persecution. She felt that others were deliberately causing her trouble." (R 88-89)

Dr. Cooney testified in his deposition that she had been depressed and withdrawn (R 72). She also suffered from delusions of persecution (R 151-152, 165, 166-167) and was emotionally upset (R 72).

Her case was described by Dr. Coen as "early" and "relatively mild in degree" (R 91). Dr. Lee, however, testified that such conditions are always severe (R 117).

Dr. Dickel, who saw the deceased briefly on two occasions in Dr. Coen's absence (R 41, 43) and who actively participated in her treatment (R 89-90) testified that if he, a psychiatrist, were filling out the application, he would describe her condition as nervous prostration rather than mental derangement, because the term "mental derangement" more accurately refers to an organic disease (R 55-58). Dr. Cooney described her condition as a "nervous breakdown" (R 70; see also R 160, 163-164).

Dr. Lee, a member of appellant's board of directors and its principal medical advisor, testified that the company had relied implicitly on the answers contained in the application and that if the true nature of the insured's illness, her psychiatric diagnosis or the names of the treating psychiatrists had been disclosed, the policy would not have been issued (R 100-108, 119, 120-121, 123-124). The designation of "nervousness" in the application (R 227, 230) had meant little, since the company related it to the further reference to sur-

gery (R 114-116, 120). The answers gave no indication whatever that the insured was suffering from a mental illness, and the company had seen no need to make any inquiry of Dr. Cooney regarding Mrs. Montgomery's medical history, because the facts disclosed indicated only that she was an insurable risk (R 115, 120; see also R 78).

Dr. McGee was the medical examiner who filled in Part 2 of Mrs. Montgomery's application, basing his answers upon his examination and statements then made to him by the applicant (R 130-133, 230). Over appellant's objection, he was permitted to testify that he knew she had been in the hospital, although he could not recall when or how he learned of it or whether she told him at the time of the examination (R 133-134, 144-145; see also R 135-137, 139). (See R 133-134, where the question and objection first appear, and R 139, 141-142, 143 where, during an offer of proof, the trial judge changed his original ruling excluding the testimony.)

Appellee admitted on cross examination that he had himself written a large part of the application and had assisted Mrs. Montgomery in preparing it (R 83-84, 159-160, 162, 227). It also appeared that appellee discussed his wife's condition with Dr. Coen (R 83, 157, 168-170) and with Dr. Cooney, in the latter case with specific reference to schizophrenia (R 66, 77-78).

SPECIFICATION OF ERRORS

1. The trial court erred in denying appellant's motion for a directed verdict.

The motion was as follows:

> ". . . defendant moves the Court for an order directing the jury to return its verdict against plaintiff and in favor of defendant on the grounds and for the reason that it affirmatively appears without question that the plaintiff and the deceased, Anna Grace Montgomery, at the time of the application for insurance to the defendant, made answers in the application which were made false, wilfully false, and with regard to the answer requesting the names of doctors who had been consulted for any ailment as set forth in question No. 29, the names of the doctors were not filled in, and even though that may not have been done wilfully, it amounts to legal fraud vitiating the policy." (R 178)

2. The trial court erred in permitting Dr. McGee to testify over the objection of appellant that he knew when Mrs. Montgomery consulted him respecting the medical portion (Part 2) of the policy application that she had been confined in Holladay Park Hospital, although he could not recall whether she spoke to him about it at that time or whether he learned of it at some other time and place.

The initial offer of testimony, appellant's objection thereto and the court's initial ruling were as follows:

"Q. Did you know that Mrs. Montgomery had been confined in the Holladay Park Hospital?

Mr. Gearin: Objected to, your Honor, on the grounds and for the reason that the information he received from outside sources would not be binding upon the company unless it was disclosed at the time of the examination that he made for which he may have been deemed to have been acting in our behalf.

Mr. Davis: I will limit my question, your Honor.

Q. At the time that you examined Mrs. Montgomery for the Bankers Union Life, did you know of the prior condition, Doctor, that is, her nervous condition?

Mr. Gearin: Just a moment, please. We object, your Honor, on the grounds and for the reason that his knowledge at that time may have been acquired from other sources, and I think it should be limited to the information — to his examination that he made at that time, and I further object upon the other ground, that the witness has stated he cannot recall what was said at the time."

The Court: I am going to sustain the objection at this time with permission to make an offer of proof in a few minutes." (R 133-134)

In the course of appellee's offer of proof the following transpired:

"The Court. It seems to me that in view of the witness' statement to the effect that he does not recall exactly whether Mrs. Montgomery told him that she had been to Holladay Park Hospital or whether he knew it from prior contact makes this

testimony admissible on the ground that she may have divulged the information to him and he, in his judgment, elected not to put it down.

I realize that it is highly irregular for a physician to do that, but this man says that is what he did, and I appreciate the fact that it is difficult testimony to meet, but I am going to overrule the objection and permit the witness to testify. . . ." (R 139)

Mr. Gearin: May I ask the nature of the Court's ruling with regard to your statement that you are overruling the objection? May I inquire as to that?

The Court: I told you the reason. The reason why I interrogated this witness further was to determine precisely the basis upon which this testimony may or may not be admissible. It was admissible, in any event, because the witness has stated here that he does not recall exactly what the deceased told him. She may have told him that she had been to Holladay Park Hospital in addition to his own knowledge. If that is true, then the plaintiff has the privilege of bringing that out because his interpretation of the questions would depend upon the information divulged to him at the time. That is the only thing that I have ruled upon that he can bring out that information. . . ." (R 141-142)

Thereafter, the following transpired in the presence of the jury:

"Q. (By Mr. Davis): Dr. McGee, at the time Mrs. Montgomery was out in your office for examination, at that time did you have knowledge

that Mrs. Montgomery had been in the Holladay Park Hospital here in Portland?

A. Yes.

Q. Did you know the names of the doctors that were taking care of her at the Holladay Hospital?

A. No, I didn't.

Q. Do you know that they were doctors there — I mean, let me ask you this question, Dr. McGee. Did you know that Dr. Cooney was not affiliated or attached—

The Court: Well, that is not the question that you indicated you wanted to ask. You wanted to ask, and the question that I sustained an objection to and later set aside my ruling was: Did she divulge to him at the time that she had been to the Holladay Hospital. First, let him answer that question, and then you can proceed with the other line of interrogation.

Mr. Davis: Yes.

The Witness: I don't recall at the time whether that was discussed or not. I did know that she had been to Holladay Hospital, but whether it was discussed, your Honor, at that time or not I don't remember, with Mrs. Montgomery." (R 144-145)

Summary of Argument

I

1. The evidence was conclusive and uncontradicted that the policy application[2] prepared by the insured and appellee and submitted to appellant contained wilfully false statements respecting the medical history of the insured which were material to the risk and were relied on by appellant in issuing the policy.

2. The evidence was conclusive and uncontradicted that the insured and appellee failed to disclose to appellant facts and circumstances respecting the insured's medical history which were material to the risk and known to them and which were within the scope of the questions contained in the policy application.

3. a) The insured and appellee failed to disclose the names of doctors who had treated the insured; and

---

[2] The application was attached to the policy (R 227), which contained the following language:

> "This policy, including the endorsements printed or written hereon or attached hereto by the Company, and the application herefor, a copy of which is attached to and made a part of this policy, constitute the entire contract between the parties. . . ." (R 223)

ORS 736.305 provides:

> "(1) Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract. In that case, if the company delivers a copy of such application to the assured, thereupon such application shall become a part of the insurance contract. If the application is not so delivered to the assured, it shall not be made a part of the insurance contract.
>
> (2) Matters stated in an application shall be deemed to be representations and not warranties."

b) They failed to disclose that the insured had spent 18 days in Holladay Park Hospital, had been diagnosed a paranoid schizophrenic and had received shock treatments during her confinement.

4. Appellant as a matter of law was entitled to rescind the policy.

II

The testimony of Dr. McGee was not material to any issue in the case and was highly prejudicial to appellant. Appellee expressly disclaimed any right to recover based on waiver or estoppel, nor did he claim that the knowledge of Dr. McGee (if any) could or should be imputed to appellant. The testimony was wholly outside the issues drawn by the pretrial order.

ARGUMENT

I

1. Nowhere in answering the questions quoted from the application did the insured and appellee disclose:

a) That she had spent 18 days as a psychiatric patient in Holladay Park Hospital in 1951 and had been found to be suffering from schizophrenia, paranoid.

b) That she had received shock treatments while in the hospital.

c) That she had been treated by two psychiatrists, Dr. Robert Coen and Dr. Herman Dickel.

The failure to disclose these facts constituted legal fraud, and appellant was entitled to rescind the policy.

2. A failure to disclose prior medical treatment known to the insured, if requested by the company, constitutes wilful fraud entitling the company to rescind the policy.

> ". . . There must be an element of wilfulness or knowledge that the statement on that point is untrue, in order to bind the assured. The reason of this is that many times a person may be afflicted with a disease, at least in its incipient stages, without being aware thereof and may answer in good faith that he has not had any such disease. **The representation, however, that he has not consulted or been treated by any other physician is one peculiarly within his knowledge and the law requires in such a case the utmost good faith and full disclosure in answer to direct inquiries on the part of one making an application for the policy."** (Emphasis supplied.) *Mutual Life Insurance Co. v. Chandler*, 120 Or 694 at p. 698, 252 Pac 559 (1927)

Although the extent of the insured's and appellee's knowledge of her diagnosis is uncertain (R 94, 75), both she and appellee, who assisted her in preparing the application and physically wrote a large part of it (R 83-84, 159-160, 162, 227) and who seeks to recover herein as the policy beneficiary, knew all of the other facts set forth above respecting her medical history. Appellee visited Mrs. Montgomery in the hospital daily (R 155) and gave his consent to the shock treatments (R 82-83, 93). He discussed her condition with Dr. Coen and Dr. Cooney (R 66, 77-78, 83, 157, 168-170). Although he would not admit more than the possibility that he, a doctor (R 81-82, 148-149), had ever inquired about or been advised of his wife's diagnosis (R 169-170), Dr. Cooney admitted that the insured's condition, **with specific reference to schizophrenia,** was discussed between them (R 77-78).[3]

3. Dr. Lee testified (and his testimony is undisputed) that these matters were material to the risk and that the policy would not have been issued if they had been known (R 100-108, 119, 120-124). The jury found the questions to be material and that appellant relied on the answers to them (R 16-17). Furthermore, the prior

---

[3] Appellee is bound by the contents of the application, and his knowledge and fraud vitiate the policy, because he assisted her to complete the application and is the policy beneficiary. *Gamble v. Metropolitan Life Ins. Co.*, 92 S C 451, 75 S E 788 (1912); Anno: 41 LRA (ns) 1199. Furthermore, the insured was bound by having retained the policy following its issuance. *Comer v. World Ins. Co.*, 65 Or Adv Sh 739, 745, 318 P2d 913, 916 (1957); *Minsker v. John Hancock Mutual Life Ins. Co.*, 254 N Y 333, 173 N E 4 (1930).

medical history of the insured is material as a matter of law. In *Comer v. World Ins. Co.*, 65 Or Adv Sh 739, 745, 318 P2d 913, 916 (1957) the company, on its application form, inquired whether the applicant had received medical or surgical treatment or had any local or constitutional disease within the last five years, to which plaintiff answered "No". In fact, plaintiff had had intestinal trouble resulting from a "marked anxiety tension state" for some months before applying for the policy. He had been in the hospital for 15 days and had been given six electric shock treatments. Thereafter, he continued to have physical ailments resulting from "aggravated anxiety."

In holding that the policy was vitiated by fraud and that plaintiff's retention of the policy charged him with knowledge of the answers, even though he had assertedly told the company's agent the truth when the agent filled out the application (65 Or Adv Sh 745 at pp. 768-769), the Supreme Court of Oregon said:

> "The medical treatment which an applicant has received is material to the prospective insurer inasmuch as the applicant's physicians are best qualified to inform the insurer of the nature and gravity of the disability for which the medical men treated the applicant."[4] (at p. 758)

---

[4] See *Martin v. Metropolitan Life Ins. Co.*, 192 F2d 167 (CA 5 1951):
". . . What makes the misrepresentation material is not that the thing misstated caused or contributed to the death, but that it affected the *risk*, and probably influenced the insurer's acceptance of the risk." (at p. 169)

See also *Mutual Life Insurance Co. v. Chandler*, supra, 120 Or 694 at pp. 700-701, 252 Pac 559 (1927); Anno: 131 ALR 617.

4. The fragmentary disclosure in the present case falls wholly short of the information requested and which the insured and appellee were obligated to furnish, and constituted legal fraud.

In *Parker v. Title & Trust Company*, 233 F2d 505 (CA 9 1956) this Court, applying the law of Oregon with regard to half truths contained in insurance applications, said:

> ". . . whatever may be the rule respecting the right of a contracting party to remain silent concerning material facts known to him and which he knows are unknown to the other party, yet if he undertakes to make some statement respecting the matter, he cannot indulge in half-truths. The rule is stated in Pohl v. Mills, 218 Cal. 641, 24 P.2d 476, 481, as follows: ' "Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure." (at p. 510)

See also: *Johnson v. Cofer*, 202 Or 142 at pp. 150-151, 281 P2d 981 (1955); *Dahl v. Crain*, 193 Or 207 at pp. 224-225, 237 P2d 939 (1951); *Palmiter v. Hackett*, 95 Or 12 at pp. 17-18, 185 Pac 1105, 186 Pac 581 (1920).[5]

In *Mutual Life Insurance Co. v. Chandler*, supra, 120 Or 694, 252 Pac 559 (1927) the insured's failure to give the names of all physicians consulted by him in response to a question seeking this information entitled the insurer to rescind the policy. **His knowledge of such medical treatment made the representation wilfully false, whether or not he knew the true nature of his condition.** The court said:

> ". . . The parties were negotiating for the purpose of making a contract of insurance. Each was entitled to the exercise of the utmost good faith on the part of the other. The assured had made an offer to the company couched in certain terms. He said, in substance, 'I am a man who has consulted only one physician whom I name and that merely for mild attacks of influenza and tonsilitis which did not prevent me from working at my usual occupation.' . . .
>
> "Some precedents have been cited where the question was one of fact whether the defendant had the disease or not, or whether the physician was in

[5] See 17 Appleman on Insurance 177 (§ 9493, fn. 27):

> ". . . The rule as to estoppel of the insurer by accepting an incomplete answer was adopted only to apply to such instances where the answer was obviously incomplete, so as to impose the duty on the insurer, acting with reasonable prudence, to inquire further. If the answer is, on its face, complete, there is no reason for the insurer to suspect a fraudulent concealment. and no circumstance calling its attention to the necessity of further investigation. Such semitruths are, at least, semifrauds; and since the purpose of such concealment is obviously to mislead the insurer and to induce reliance by it, the insured should not profit from his wrongful act."

> fact consulted or not, and, on the ground that there was evidence entitled to go to the jury making it a question of fact to be determined, the courts have upheld recoveries against the insurer; but where a direct question is asked by the very terms of the policy a true answer is made material. . . ." (at pp. 700-701)

See also *New York Life Insurance Co. v. Yamasaki*, 159 Or 123, 78 P2d 570 (1938), in which the application for a policy of life insurance contained the following question and answer:

> "2. Within the past two years have you had any illnesses, diseases or bodily injuries or have you consulted or been treated by any physician or physicians? (If so, give full details, including nature, date, and duration of each illness, disease or injury, the name of each physician, and the dates of and reason for consultation or treatment.)
>
> "Ans. No, except sprained ankle July 3, 1935. No fracture. Fully recovered. Dr. Gearey, Westport, Oregon." (at p. 125)

The evidence showed, however, that

> ". . . on July 3, 1935, the insured had sustained a very serious injury by being caught in a propeller shaft, resulting in an injury to his foot, ankle, ribs, back, head and groin and that, at the time he made application for reinstatement of the policy, he was under the care of a physician and seriously ill from the effects of the accident." (at p. 125)

Rescission of the policy by the insurer was sustained:

> ". . . In his application he had not only **falsely represented the seriousness of the accident which he had sustained** but the condition of his health, and had falsely concealed the fact that at the time he was under the treatment of Doctor Holt and was suffering great pain from the injury which he had sustained. If these facts had been disclosed, the reinstatement would not have been granted. . . ." (at pp. 126-127; Emphasis supplied.)

See also: *Northwestern Mutual Life Insurance Co. v. Cohn Bros.*, 102 F2d 74 at pp. 77-78 (CCA 9 1939).

5. The questions contained in Part 2 of the application were answered by Dr. McGee wholly from his limited physical examination and from answers given by the insured. All of the questions were answered **by the insured** (R 136). In response to the following question on Part 2 of the application:

> "10. E. Have you consulted or been treated by any physician for any ailment or disease not included in your above answers? (If so, give full details.)" (R 230)

The insured answered "*Yes—Nervousness—Before and after above surgery—Excellent—Dr. Joe Cooney.*" (R 230)[6]

[6] Compare the answer to questions 28 and 29 of Part 1 of the application, in which, in answer to similar questions, the insured gave similar incorrect answers.

Dr. McGee may not have filled out this portion of the application (R 133; see also R 129, 132, 147-148).

Admittedly two physicians (Dr. Coen and Dr. Dickel) were consulted in connection with this "ailment" who were not named. Dr. Lee testified to the materiality of the identity of these doctors:

> "Q. Would it have been any more notice to you or to Bankers Union Life if the words nervousness had been put down on the ailment which Mrs. Montgomery allegedly suffered from and had she listed Dr. Coen and Dr. Dickel and whatever the name of the man was, the doctor in the field of neurology?
>
> A. Definitely, because then we would have immediately figured that she had some mental disease that required specialists to help in.
>
> Q. Would the mere fact that the names of the doctors were given indicate to you they were specialists?
>
> A. No, we look them up in the directory and then we find out. We look them up in the medical directory and find out what their specialties are." (R 124)

Furthermore, the designation of "nervousness" did not disclose the diagnosis of schizophrenia, paranoid (R 115-116, 119-120), and the reference to surgery convinced the company that the condition was casual and temporary and did not justify further investigation. It did not suggest a serious mental illness (R 114-116, 120, 227, 230).

6. Question 33 of Part 1 of the application (R 17, 227) and its answer were:

> "Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the company should be advised? (If none, please state 'None'.)
>
> "*None*"

In the leading case of *Stipcich v. Metropolitan Life Ins. Co.*, 277 US 311, 48 S Ct 512, 72 L ed 895 (1928), which concerned the effect of the failure of the insured to disclose a condition arising after he made application for a policy but prior to its issuance, the court said:

> "Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. . . ."
>
> * * * * *
>
> ". . . For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. . . ." (at pp. 316-317)

See also *Cohen, Friedlander (etc.) Co. v. Massachusetts Mutual Life Ins. Co.*, 166 F2d 63 (CCA 6 1948)

Appellee and the insured both knew of this medical history, but failed to suggest or disclose it to appellant. Both the questions and the law imposed an affirmative burden on them to disclose these facts, facts which were hidden behind the quarter truth of "nervousness." The legal fraud in this case stands admitted, and appellant was entitled as a matter of law to rescind the policy.

7. Finally, it was legal fraud to describe the insured's condition as "nervousness" in answer to Question 28 of Part 1 of the application. One might as well describe pneumonia as a cold, or an ulcer as an upset stomach. The answer was, on its face, incorrect and misleading.

No issue was presented for the jury's consideration. As a matter of law the answers in the application were wilfully false and a verdict should have been directed for appellant.

II

Dr. McGee's testimony that he knew when Mrs. Montgomery was in his office that she had been in Holladay Park Hospital, although he could not recall

when he received this information or whether it was discussed at that time (R 144-145), was peculiarly damaging to appellant and was immaterial to any issue in the case. It was error for the trial court to receive it.

The testimony was assertedly admitted on the ground

> "that she may have divulged the information to him and he, in his judgment, elected not to put it down." (R 139)[7]

1. The question of notice to the company through Dr. McGee of the insured's medical history was not an issue in the case. Counsel for appellee repeatedly assured the court that there was no assertion of waiver or estoppel, nor was it ever suggested that Dr. McGee's knowledge (if any) could or should be imputed to ap-

---

[7] In the course of denying appellant's motion for a new trial, the trial court expanded its ruling as follows:

> ". . . The question that was asked Dr. McGee was: did she tell him that she had been in Holladay Park Hospital, and then the answer came out he did not know whether she told him at that time or whether he knew it from his own information. It was my view at that time, and it is my view now that the plaintiff was entitled to have that testimony before the jury.
>
> "If she had told him that she had been to the Holladay Hospital during that examination and he, himself, failed to put it down, that would have been an interpretation which he gave to those questions. Even though it is not admissible on the question of notice, it certainly is admissible on the question of what was divulged to Dr. McGee at the time of the examination. An insured is not responsible if Dr. McGee fails to put down all the information divulged to him, and that was the basis upon which I decided that the testimony of Dr. McGee was admissible.
>
> "To clarify, further, he didn't know whether she had told him or whether he had known it from prior information. (R 218-219)

pellant (R 79, 214). No such issue was pleaded (R 4-7, 8) or drawn in the pretrial order (R 10-12).[8] However, on final argument counsel asserted to the jury that appellant should have consulted Dr. McGee before issuing the policy (R 193).

2. This was **the only testimony** suggesting that the matter of Mrs. Montgomery's hospitalization was brought to Dr. McGee's attention or was otherwise in his mind when the application was made out. It did not bear on the question, since **it showed only that he had no recollection of the fact whatever.** Yet it was admitted on the theory that it showed the doctor's contemporaneous knowledge of her medical history and his election not to disclose it.

It did not constitute substantial evidence of such notice, since it was expressed only in terms of possibility and not probability. Repeatedly during the offer of proof, Dr. McGee told the court that he simply did not remember whether or not he had discussed the

---

[8] The medical history portion of Part 2 of the application may not even have been written by Dr. McGee:

"Q. This question (e), 'Have you consulted or been treated by any physician for any ailment or disease not included in your above answers,' there was the word, 'No'; then it was crossed out, and it was, 'Yes.' 'Name of Ailment — Nervousness — before and after above surgery — excellent — Dr. Joe Cooney.'

I would like to hand this back, give it to you, Dr. McGee, and ask you if you know whether that is in your writing or in whose writing that is?

A. That is not in my writing.

Q. That is printed?

A. That's right." (R 133; see also R 147-148)

subject with the insured (R 135-137). See *Henderson v. Union Pacific Railroad Co.*, 189 Or 145 at pp. 160-161, 219 P2d 170 (1950). There was no other evidence suggesting that Dr. McGee had any of these matters in his mind during Mrs. Montgomery's visit or made any election not to disclose it. There was no circumstantial or indirect evidence with which it might have been considered. In short, this testimony fulfilled no purpose whatever, but stood alone before the jury, to whom it could only suggest knowledge or notice which was not claimed and which did not exist. The evidence was prejudicial and damaging and was immaterial to any issue in the case.

CONCLUSION

The record in this case demonstrates conclusively that appellee's case failed on the merits and that appellant's motion for a directed verdict should, as a matter of law, have been granted and, in addition, that errors occurred during the trial with respect to the admission of evidence which would require a new trial. This Court is now requested to do what the trial court should have done and direct entry of judgment for appellant. If the Court should disagree with this conclusion, it should grant appellant a new trial.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF

JOHN GORDON GEARIN

JAMES H. CLARKE

Attorneys for Appellant
800 Pacific Building
Portland 4, Oregon

APPENDIX

EXH	IDENT	OFF	REC
Def Ex 1 (R 221-229)	R 12-13	R 38	R 39
Def Ex 2A (R 230-231)	R 99, 127-128	R 128	R 128
Def Ex 3A (R 227)	R 12-13, 84, 99	R 84	R 84
Def. Ex 6A	R 12-13	R 39	R 39